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Supreme Court, U.S.
FILED
SEP 13 2006
OFFICE OF THE CLERK

No. 06-222

IN THE

Supreme Court of the United States

LYNN STUTER, *et al.*,

Petitioners,

v.

STEVENS COUNTY SHERIFF DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari ("Petition") to be granted. Specifically, Petitioners fail to establish that the Ninth Circuit's May 12, 2006 unpublished decision (Decision) is in conflict with any decision of any other United States Court of Appeals on the same important matter, or that the Decision decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioners assert two basic arguments in support of their Petition, both of which are not supported by the law or the facts. First, Petitioners argue that the Decision is in conflict with *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993). Second, Petitioners argue that this Court should examine whether the "evolving state created danger" exception to this Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) is "sound." As set forth herein, the Ninth Circuit's Decision is not only consistent with well-established law regarding the "state created danger" doctrine, it is also entirely consistent with the holding of, and sound policy behind, *DeShaney* and it progeny. As such, Respondent Stevens County respectfully submits that this Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In very summary form, this case involves acts of alleged harassment and/or criminal conduct directed at Petitioners by private, third-party actors. The issue before the lower courts, and the issue before this Court, is whether Respondent can be liable to Petitioners for failing to stop the alleged harassment and criminal conduct, or whether, as was

concluded by the trial court and the Ninth Circuit Court of Appeals, such claims are precluded by *DeShaney v. Winnebago*.

In answering this question, there are two undisputed facts of particular note. First, the alleged harassment was conducted by third-party actors (local high school students), and there has never been the allegation that Respondent affirmatively participated in the harassment. Second, the harassment, which commenced in 1995, was allegedly the result of Lynn Stuter's position on educational reform. *Pet.App. 30a-31a*. The harassment thus predated any involvement from Respondent. *Pet.App. 6a*. As such, Respondent did not "create" the harassment/danger complained of by Petitioners. *Pet.App. 52a-53a*.

Since Respondent did not "create" the harassment/ danger, and since Respondent did not "participate" in the harassment, the question is whether Respondent's purported failure to protect Petitioners from that harassment deprived Petitioners of any constitutionally-protected rights. While Petitioners now, in an effort to avoid the preclusive affect of *DeShaney*, claim the existence of a "conspiracy" between Stevens County deputies and the third-party actors, whereby the deputies "ratified" and "supervised" the alleged harassment, the central tenet of Petitioners' theory of liability in this case has always been that Respondent "failed to act" to protect Petitioners from the harassment. In fact, in their Complaint, Petitioners very specifically alleged that Respondent "failed to investigate" the complaints of harassment (*Pet.App. 72a*); failed to investigate or "determine the perpetrators of [the harassment]" (*Pet.App. 74a*); took "no action" with respect to the complaints (*Pet.App. 76a*); "refused to provide material assistance, protection or

resolution" relating to the complaints (*Pet.App. 79a*); "conducted little to no investigations" into the complaints (*Pet.App. 80a*), and; "failed to provide proper assistance" on the complaints (*Pet.App. 80a*).

Now, having had both the trial court and the Ninth Circuit find their claims precluded by *DeShaney*, Petitioners attempt to obtain review by this Court by mischaracterizing the extent and nature of the "harassment" to which they were exposed, and more importantly, Respondent's knowledge of, and response to, that harassment. In that regard, Petitioners have incorrectly and repeatedly asserted that Respondent ratified or incited the "criminal conduct" of the harassers by failing to "criminally cite [the] teenagers." *Petition, pg. 4.* In the most blatant misstatement in that regard, Petitioners assert that Respondent "viewed, supervised in some cases, and failed to address or remedy" alleged criminal behavior. *Petition, pg. 14.* Petitioners' assertions in this regard are both misleading and a mischaracterization of the record, as there is no evidence that any deputies ever "viewed" or "supervised" any criminal behavior. Rather, the evidence establishes that while the deputies responded repeatedly and without fail to Petitioners' numerous requests for officer contact, the "criminal conduct" Petitioners claim to have been exposed to was neither "viewed" nor "supervised" by any deputy. In arguing to the contrary, Petitioners "mix and match" alleged criminal conduct that occurred outside the deputies' presence, by persons unknown to the deputies, with non-criminal conduct that may have occurred in the deputies' presence. Respondent will clarify those mischaracterizations herein.

The "harassment" to which Petitioners were subjected can generally be separated into two categories: (1) conduct

that occurred during the annual homecoming car rally; and (2) conduct that occurred at other times. This distinction is necessary, as the evidence establishes that the alleged criminal conduct complained of by Petitioners (i.e., the shooting of paintballs at Petitioners' house) was not "viewed" or "supervised" by any deputies, making it impossible to find that the deputies condoned, encouraged, supported or incited the conduct by not issuing criminal citations for the same.

1. The Annual Lakeside High School Homecoming Car Rallies.

According to Petitioners, the annual Lakeside High School homecoming car rally first "targeted" their house on October 27, 1995. *Pet.App. 31a.* Petitioners alleged that the participants in the car rally yelled obscenities as the cars drove past Petitioners' house. *Id.* There is no evidence, or assertion, that any deputy viewed or supervised the car rally, let alone any unidentified criminal conduct that may have occurred during the same.

On October 16, 1996, the car rally again proceeded by Petitioners' house. *Id.* This time, eggs and tomatoes were allegedly thrown at Petitioners' house by participants in the rally. *Id.* Subsequent to the rally, Petitioners reported the conduct to Respondent. *Id.* Again, there is no evidence, or even assertion, that any deputy viewed or supervised the rally or any of the conduct of its participants. To the contrary, the evidence establishes that Respondent was not made aware of the conduct until *after* it had occurred.

The next car rally occurred on September 24, 1997. *Pet.App. 32a.* This time, Respondent was called during the car rally. *Id.* A deputy responded, disbursing the participants

when he activated his lights and (possibly) siren. *Id.* Subsequently, Mrs. Stuter wrote a letter to Respondent acknowledging the deputies' efforts at deterring the conduct, and extending her thanks for the same. *Id.* There is no evidence, or assertion, that any deputy viewed or supervised any criminal conduct occurring in the 1997 rally.

The 1998 homecoming car rally occurred on September 30, 1998. *Id.* After the rally had made several passes by Petitioners' house, Stevens County deputies diverted the cars away. *Id.* Respondent had in fact stationed multiple patrol cars to be present during the rally, and even had a deputy stationed in Petitioners' driveway during the rally. *Pet.App. 32a-33a.* There is no evidence that any deputy viewed or supervised criminal conduct that may have occurred during the 1998 car rally. In fact, subsequent to the rally, Mrs. Stuter again thanked Stevens County for its efforts during the rally. *Pet.App. 33a.*

On September 29, 1999, the annual car rally again proceeded by Petitioners' house. *Pet.App. 33a-34a.* In response, Mrs. Stuter parked a vehicle in the road, blocking oncoming traffic. *Pet.App. 34a.* Mrs. Stuter stood in the road, armed with a shotgun. *Id.* A deputy was called to the scene and was able to convince Mrs. Stuter to move her vehicle off the road. *Id.* The deputy subsequently referred the matter to the prosecutor, who made the decision to file disorderly conduct charges against Mrs. Stuter. *Id.* There is no evidence that any deputy viewed or supervised any alleged criminal conduct that may have occurred during the 1999 car rally (except for the criminal conduct of Mrs. Stuter).

There was apparently no homecoming car rally in 2000.

The 2001 car rally occurred on October 5, 2001. *Id.* Two deputies patrolled the area around Petitioners' house that evening, ticketing ten different vehicles for various traffic infractions. *Pet.App. 36a.* There is no evidence that either deputy viewed or supervised any criminal conduct that may have occurred during that rally.

The 2002 car rally did not drive in front of Petitioners' house. *Pet.App. 37a.*

2. Alleged Conduct Occurring At Times Other Than During The Car Rallies.

Petitioners contend that between 1995 and 2004, they were subjected to various acts of harassment by unknown persons at varying times of the day and night. These various acts of harassment ranged from firecrackers being thrown into Petitioners' yard (*Pet.App. 32a*), to having videotape strung along their fence (*Pet.App. 35a*), to having a beer bottle thrown into their yard (*Pet.App. 35a*), to having persons drive by their house and honk (*Id.*), to having candy wrappers put in their mailbox (*Pet.App. 38a*).

The evidence regarding the non-car-rally "harassment" establishes two things. First, it is "beyond any possible dispute that the Sheriff's Department invested a great deal of time and resources responding to approximately 70 reports" from Petitioners (*Pet.App. 44a*), during which the deputies took reports, collected evidence and attempted to obtain fingerprints (*Pet.App. 44a, 46a*). Second, and perhaps more importantly, none of the alleged criminal conduct was "viewed" or "supervised" by Respondent. The record is entirely devoid of any evidence that Respondent witnessed firecrackers being thrown in Petitioners' yard,

persons shooting paintballs at Petitioners' house, trash being thrown in Petitioners' yard, etc. So, while Petitioners are correct that with one exception, the deputies have not "criminally cite[d] teenagers" for their conduct, the implication that the deputies had any basis to "criminally cite teenagers" is unsupported. Not only is there a complete lack of any evidence that any deputies observed any of the alleged criminal conduct, there is a similar lack of any evidence that the deputies even knew who committed the alleged criminal conduct. In the absence of such evidence, there is a corresponding lack of any evidence that the deputies in any way encouraged, supported, supervised, incited or sponsored the alleged conduct by not issuing criminal citations.

REASONS FOR DENYING PETITION

1. The Ninth Circuit Court Decision Does Not Conflict With *DeShaney v. Winnebago*, Or With Ninth Circuit State-Created Danger Jurisprudence.

In *DeShaney v. Winnebago County Dept. of Social Services*, this Court held that the return of a child in temporary custody to an abusive father did not state a substantive due process claim. In so holding, the Court made clear that as "a general matter," a "State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. In reaching this result, the Court emphasized that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. The state escaped liability because

"it placed [Joshua] in no worse position than that in which he would have been had it not acted at all." *Id.* at 201.

Lower courts were quick to respond to the Court's language regarding the state not placing Joshua in a "worse position" than he would have been in if the state had not acted at all, and from it, the "danger creation" doctrine has become a fixture of due process jurisprudence. The Ninth Circuit first recognized the "danger creation" doctrine in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). In *Wood*, a state trooper determined that the driver of an automobile was intoxicated, arrested the driver and impounded the car. The officer's actions allegedly left Wood, a female passenger, stranded late at night in a known high-crime area. Subsequently, Wood accepted a ride from a passing car and was raped. The Ninth Circuit held that Wood could claim § 1983 liability, since a jury could find "that [the trooper] acted with deliberate indifference to Wood's interest in personal security under the fourteenth amendment." *Id.* at 588.

Since *Wood*, the Ninth Circuit has held state officials liable in a variety of circumstances for their roles in creating or exposing individuals to danger they otherwise would not have faced. *See L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) ("*Grubbs*") (holding state employees could be liable for the rape of a registered nurse assigned to work alone in the medical clinic of a medium-security custodial institution with a known, violent sex-offender); *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997) (holding as viable a state-created danger claim against police officers who, after finding a man in grave need of medical care, cancelled a request for paramedics and locked him inside his house); *Munger v. City of Glasgow*, 227 F.3d 1082 (9th Cir. 2000) (holding police

officers could be held liable for the hypothermia death of a visibly drunk patron after ejecting him from a bar on a bitterly cold night).

These cases establish that state actors may be held liable "where they affirmatively place an individual in danger," *Munger*, 227 F.3d at 1086, by acting with "deliberate indifference to [a] known or obvious danger in subjecting the plaintiff to it," *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996) ("*Grubbs II*"). Thus, in

> examining whether an officer affirmatively places an individual in danger, we do not look solely to the agency of the individual, nor do we rest our opinion on what options may or may not have been available to the individual. Instead, we examine whether the officer[ ] left the person in a situation that was more dangerous than the one in which they found him.

Kennedy v. City of Ridgefield, 439 F.3d 1055, 1062-63 (9th Cir. 2006).

Case law in the Ninth Circuit is clear. The state-created danger doctrine requires more than a mere failure to act; it requires the state official to take an affirmative action. *See Penilla v. City of Huntington Park*, 115 F.3d at 710 ("[I]f affirmative conduct on the part of a state actor places a plaintiff in danger, and the officer acts in deliberate indifference to that plaintiff's safety, a claim arises under § 1983."). The plaintiff must also prove that the official's act did more than simply expose the plaintiff to a danger that already existed. *Grubbs*, 974 F.2d at 121. Finally, the plaintiff must prove that the official acted with deliberate indifference to known or obvious dangers. *Grubbs II*, 92 F.3d at 900. This is the exact standard applied by the Ninth Circuit in its Decision in this matter.

Citing *Kennedy v. City of Ridgefield*, the Ninth Circuit in this case noted that the "predicate question" in the danger-creation analysis is whether Respondent took any "affirmative actions" that placed the Stuters "in danger that [they] otherwise would not have faced." *Pet.App. 6a.* Answering this question in the negative, the Ninth Circuit noted that "the harassing activities predated any involvement by the Department, and the record is devoid of evidence that any affirmative action by the Department increased the danger posed to the Stuters in a manner sufficient to satisfy the *Kennedy* requirements." *Pet.App. 6a.* In so holding, the Ninth Circuit's Decision is entirely consistent with the law in the Ninth Circuit regarding the "danger-creation" doctrine.

The Ninth Circuit's Decision is likewise entirely consistent with this Court's decision in *DeShaney v. Winnebego* and subsequent case law. In *DeShaney*, the Court noted that the "Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."). *DeShaney*, 489 U.S. at 196. "As a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. It is only when the state, by the "affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself," the state may incur an "affirmative duty to protect" the individual. *DeShaney*, 489 U.S. at 200. "[T]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200.

Recently, this Court reaffirmed the principle behind its ruling in *DeShaney*:

> In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as "'a font of tort law,'" *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (quoting *Paul v. Davis*, 424 U.S., at 701, 96 S. Ct. 1155), but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law. *Cf. DeShaney*, 489 U.S., at 203, 109 S. Ct. 998.

Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 125 S. Ct. 2796, 2810 (2005).

A Writ of Certiorari is not proper or necessary in this case, as the Court of Appeals' Decision is entirely consistent with both the law of this Court and the law of the Ninth Circuit. *DeShaney* is very clear that the due process clauses generally confer no affirmative right to governmental aid.

Petitioners' claims against Respondent are premised upon the theory that Respondent had an affirmative duty to provide government aid – "protection" against the harassment of private actors. The Ninth Circuit's Decision is consistent with *DeShaney*. The Ninth Circuit's Decision is similarly consistent with Ninth Circuit jurisprudence regarding the "state created danger" exception to *DeShaney*. There are simply no facts supporting a conclusion that Respondent in any way left Petitioners in a "worse position" as a result of Respondent's purported failure to stop the harassment.

2. The Ninth Circuit Court Of Appeals' Decision Does Not Conflict With The Second Circuit's Decision in *Dwares v. City of New York*.

As an initial matter, while Petitioners argue that the Ninth Circuit's Decision "conflicts" with *Dwares v. City of New York*, it should be noted that Petitioners have failed to identify *how* the two decisions conflict. In reality, the two decisions are entirely consistent, and Petitioners are simply in disagreement with the Ninth Circuit's conclusion that unlike *Dwares*, there are no facts in this matter that support a finding of a "prearranged official sanction" of the criminal conduct.

In *Dwares v. City of New York*, the plaintiff (Dwares) attended a flag-burning demonstration. Although he did not participate in the flag-burning demonstration, he voiced his support for those who did. Also present at the demonstration were some "skinheads," who were known to local law enforcement officers to have a history of racism and engaging in "violent attacks on individuals engaged in lawfully protected First Amendment activity." *Dwares*, 985 F.2d at 96. During the demonstration, Dwares was attacked by the skinheads. The "prolonged felonious attack" on Dwares

occurred in the presence of the defendant police officers. *Id.* In his complaint, Dwares alleged that the skinheads and the defendant police officers

> had conspired and/or agreed amongst themselves to permit the "skinheads" to harass and assault those who wished to express their First Amendment rights by burning an American flag, as well as those who supported the right of individuals to express themselves in that way, so long as this conduct did not get totally out of control.

The trial court dismissed Dwares's claim pursuant to the defendants' FRCP 12(b)(6) motion. In addressing whether the complaint stated a viable cause of action, the Second Circuit noted:

> We read the *DeShaney* Court's analysis to imply that, though an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause, an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate those rights. At least one other Circuit Court has adopted this interpretation.

Dwares, 985 F.2d at 99.

The Second Circuit distinguished the case from *DeShaney* because the complaint "went well beyond allegations that the defendant officers merely stood by and did nothing, and that circumstances were merely suspicious."

Id. Unlike *DeShaney*, the state in *Dwares* made the plaintiff "more vulnerable to assaults" because of the "prearranged official sanction" whereby the skinheads could "beat up flag burners with relative impunity." *Dwares*, 985 F.2d at 99

Recently, the Second Circuit explained its decision in *Dwares*:

> In *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993), we read *DeShaney* to imply that, though an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause, an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate those rights. *Id.* at 99. The plaintiff in *Dwares* was a participant in a political rally in New York's Washington Square Park that involved the burning of an American flag. *Id.* at 96. He had allegedly been assaulted by "skinheads" as a result. *Id.* The plaintiff alleged that police officers who were present at the time had indicated to the skinheads in advance that the police would not interfere with the assaults nor arrest those responsible for them. *Id.* at 96-97. We thought *DeShaney* to be distinguishable because the complaint "went well beyond allegations that the defendant officers merely stood by and did nothing." *Id.* at 99.

Pena v. DePrisco, 432 F.3d 98, 108 (2nd Cir. 2005)

The Second Circuit further noted that in *Dwares*, the Court had "concluded that '[s]uch a prearranged official

sanction of privately inflicted injury would surely have violated the victim's rights under the Due Process Clause.'" *Pena*, 432 F.3d at 108. In applying the "state created danger" principle, the Second Circuit has "sought to tread a fine line between conduct that is 'passive' as in *DeShaney* and that which is 'affirmative' as in *Dwares*." *Pena*, 432 F.3d at 109. For example, in *Hemphill v. Schott*, 141 F.3d 412 (2nd Cir. 1998), the Second Circuit concluded that the Due Process Clause could be violated when officers who were called to the scene of a drugstore robbery had allowed the store's manager to join them in pursuit of the suspect and then returned a gun to the manager, who then used it to shoot the plaintiff. *Id.* at 418-20. Conversely, in *Pitchell v. Callan*, 13 F.3d 545 (2nd Cir. 1994), the Second Circuit could discern no constitutional violation when an off-duty police officer did no more than fail to stop another off-duty police officer from shooting a houseguest. *Id.* at 549.

The law in the Second Circuit is not only clear, it is entirely consistent with both the Decision in this matter, and Ninth Circuit law in general:

> It is clear from the cases, we think, that to the extent that the plaintiffs allege merely that the individual defendants failed to intercede on the day of the accident, their complaints do not involve sufficient affirmative acts to violate substantive due process rights. Similarly, to the extent that the plaintiffs allege that Grey's supervisors "stood by and did nothing" to punish Grey's previous misconduct, we think those allegations are also inadequate to state a substantive due process claim. A failure to interfere when misconduct takes place, and no

> more, is not sufficient to amount to a state created danger. Under *DeShaney*, "allegations that the defendant officers merely stood by and did nothing" are insufficient to state a constitutional violation. *Dwares*, 985 F.2d at 99.

Pena, 432 F.3d at 110.

This is entirely consistent with Ninth Circuit law regarding "state created dangers," as well as the Ninth Circuit's Decision in this matter. In fact, the Ninth Circuit's Decision specifically noted that this case was "unlike *Dwares*," as there were no affirmative acts by Respondent which "emboldened the private actors." *Pet.App. 6a.*

The "predicate question" in all "danger creation" cases, whether in the Ninth Circuit or the Second Circuit, is whether or not the state engaged in "affirmative conduct" that caused or increased the danger to the plaintiff. The Ninth Circuit in *Stuter v. Stevens County* very specifically answered this question, finding the record was "devoid" of any evidence of "affirmative action" by Stevens County which "increased the danger posed to the Stuters." The Ninth Circuit's opinion is thus entirely consistent with *Dwares*, where the Second Circuit found that the complaint alleged more than passive non-action by the state. As such, there is no basis or necessity for the granting of a Writ of Certiorari.

3. Both *DeShaney v. Winnebago* And The State Created Danger Theory Are Sound.

Petitioners recognize that there is "sound policy and constitutional reasons" behind *DeShaney's* holding that the state cannot be held liable for its failure to protect citizens

from private acts of violence. *Brief, pg. 9.* However, Petitioners urge this Court to grant their Petition based upon the contention that the Ninth Circuit's Decision "so narrowly construes" *DeShaney* so as to "remove any accountability" for state agencies who "intentionally refuse to protect citizens from exercising first amendment rights." *Id.* The error in Petitioners' argument in this regard is that the facts in this case simply do establish that Respondent "intentionally refused" to protect Petitioners. To the contrary, "the Sheriff's Department responded innumerable times to the Plaintiffs' approximately 70 reports and Plaintiffs acknowledged the protection that was given during the 1997 and 1998 car rallies." *Pet.App. 47a.* In fact, the record "clearly establishes beyond any possible dispute" that Respondent "invested a great deal of time and resources in responding" to "even the most minor incidents" reported by Petitioners. *Pet.App. 44a, 59a.* To the extent it would be appropriate to review a case where the state "intentionally refused to protect citizens exercising first amendment rights," this is simply not the case.

Setting aside Petitioners' mischaracterization of the record (that Respondent "intentionally refused" to protect Petitioners), the actual inquiry Petitioners urge this Court to address is simply whether "the evolving state created danger theory is sound." For the following three reasons, this Court should not accept review of this case and address whether the "state created danger theory is sound."

First, the state-created danger theory has been applied by circuit courts for many years. This Court has had innumerable opportunities over those years to review whether the state-created danger theory is sound, yet has repeatedly declined to do so. Second, while circuit courts may vary

slightly in their state-created danger theory analysis, the fundamental question answered by the various circuits in applying the state-created danger theory is whether or not the state affirmatively placed the individual in danger. Rather than any type of conflict among the circuits in applying the state-created danger theory, there is a remarkable consistency in the various circuits' separation of those cases in which there is a failure to act/failure to protect by the state, from those cases where the state's actions actual create or enhance the danger to the plaintiff. Finally, and most importantly, Petitioners cannot identify any facts in this case establishing that Respondent created or enhanced any danger to Petitioners. In the absence of any such facts, this case falls squarely within the parameters of *DeShaney*. As such, what Petitioners are really asking this Court to do is reconsider well-established law that the state has no affirmative duty to protect citizens from the acts of private citizens.

Long before *DeShaney*, it was well-established that the Due Process Clause does not imply an affirmative duty for the government to protect citizens from private actors. *See Harris v. McRae,* 448 U.S. 297, 317-18, 100 S. Ct. 2701, 65 L. Ed. 2d 784 (1980). In *DeShaney*, the Court discussed the purpose of the Due Process clause of the Fourteenth Amendment, noting that "[t]he Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney*, 489 U.S. at 195-96. The Court concluded: "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 196-97.

This Court had the opportunity to review both the policy and purpose of *DeShaney*, and the "evolving state created danger theory" in *Town of Castle Rock, Colo. v. Gonzales*. In *Castle Rock,* respondent Jessica Gonzales obtained a restraining order against her estranged husband in Colorado State court. 125 S. Ct. at 2800. The restraining order contained a notice to law enforcement outlining the Colorado statutory/mandatory duties to enforce the order. *Id.* at 2804-05. While this order was in effect, he absconded with his daughters without prior notice. *Id.* at 2801. The police ignored the respondent's repeated requests to apprehend her husband and enforce the order. *Id.* at 2801-02. The police took no action until her husband arrived at the police station, opened fire, and was killed by their return fire. *Id.* "Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered." *Id.*

In reversing the Tenth Circuit's finding that Colorado law created an entitlement to the enforcement of the restraining order, this Court noted that "[a]lthough the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement protected by the Due Process Clause.'" *Id.* at 2803-04, *quoting Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 9, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978). The Court found that the mandatory language in the restraining order was insufficient to create an entitlement protected by the Due Process Clause because of the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands." *Id.* at 2806.

This "law-enforcement discretion" is an essential and important purpose and policy behind *DeShaney*, as it leaves officers and law enforcement agencies with some discretionary authority. That is, the officers need not fear that, in any close case, they must choose between liability for a potential false arrest and liability for a potentially actionable non-arrest. In the instant case, the deputies did respond to Petitioners' requests for officer contact, and exercised their discretion in how to handle Petitioners' calls. Petitioners are simply not satisfied with the level or scope of the response they received and now attempt to impose liability because the deputies "did not criminally cite the teenagers." It is exactly this type of claim that the "sound policy and constitutional reasons" of *DeShaney* are designed to preclude.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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